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# Ferguson v. City of Charleston: Slowly Returning the "Special Needs" Doctrine to its Roots

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# Case Comment

## *FERGUSON v. CITY OF CHARLESTON*: SLOWLY RETURNING THE "SPECIAL NEEDS" DOCTRINE TO ITS ROOTS

*Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.*[1]

### I. INTRODUCTION

The central tenet of the Fourth Amendment is that searches undertaken by government officials must be reasonable.[2] For the majority of the Nation's history, the United States Supreme Court has interpreted this command of reasonableness to require the presence of a warrant in governmental searches.[3] However, in recent years, the Court has created a growing number of exceptions to the general rule requiring the presence of a warrant and probable cause in nonconsensual searches.[4] The most recent, and perhaps most criticized, of these exceptions is the special needs doctrine.[5] This doctrine provides that in

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[1] N. Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

[2] U.S. CONST. amend. IV. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

[3] Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 530 (1997).

[4] *Id.*; *see also infra* note 52 (listing several of the Court's recognized exceptions to the warrant requirement).

[5] *See generally* Jennifer E. Smiley, Comment, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811 (2001) (asserting that the Court's special needs cases have

"exceptional circumstances" where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable" a court may, rather than require a warrant, engage in a balancing of governmental and private interests to determine the reasonableness of a search.[6]

Since the Pandora's box of special needs was first opened in 1985, the Court's jurisprudence in this area has struggled to find equilibrium.[7] In an initial series of cases, the Court applied the exception by invariably finding governmental interests to outweigh privacy concerns.[8] For several years, the exception appeared certain to replace the general preference of a warrant for searches other than those initiated and conducted by the police.[9] Then, in 1997, the Court decided *Chandler v. Miller*,[10] a case that seemed to signal a desire by the Court to limit the special needs doctrine by making its balancing test more difficult to invoke.[11] However, as the Court failed to modify or adequately distinguish its earlier opinions, *Chandler*'s ultimate effect was to create confusion as to whether the Court's previously established framework remained.[12]

With *Ferguson v. City of Charleston*,[13] the Court revisited the special needs doctrine in determining whether unauthorized drug testing of obstetrics patients in a state hospital fell within the special needs exception. While the Court held that the drug testing program was not protected by the special needs exception and, therefore, was

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failed to develop a coherent body of case law and calling on the Court to abandon the doctrine as a failed experiment).

[6] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

[7] *See generally* Buffaloe, *supra* note 3.

[8] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); O'Connor v. Ortega, 480 U.S. 709, 722 (1987).

[9] Buffaloe, *supra* note 3, at 530-31.

[10] 520 U.S. 305 (1997).

[11] *See generally* Joy L. Ames, Note, Chandler v. Miller: *Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273 (1997).

[12] *Id.*

[13] 532 U.S. 67 (2001).

unconstitutional, it remains to be determined what effect the decision will have on the special needs doctrine.[14]

This Comment considers the impact of *Ferguson* as it relates to the Court's existing special needs framework and attempts to divine its significance for future cases in this area. To this end, this Comment first examines the facts relevant to the Court's decision in *Ferguson*.[15] Second, this Comment discusses the legal background of the special needs exception, paying close attention to the Court's previous special needs cases involving suspicionless drug testing.[16] Third, this Comment analyzes the Court's holding in *Ferguson*, explaining its significance in light of previous special needs decisions.[17] Finally, this Comment briefly discusses the implications of *Ferguson* for future special needs cases.[18]

## II. STATEMENT OF THE CASE

*Ferguson* has as its backdrop the rise of "crack" cocaine use during the late 1980s and the widely perceived problem of "crack babies" born to mothers addicted to the drug.[19] During the fall of 1988, staff members of a Charleston public hospital operated by the Medical University of South Carolina ("MUSC") became concerned about an apparent increase in the use of cocaine by patients receiving prenatal care.[20] In response to the perceived problem, MUSC officials began ordering drug screens on the urine samples of maternity patients suspected of using cocaine.[21] Patients testing positive for the use of cocaine were referred to a county substance abuse treatment program.[22] However, despite referrals to treatment, MUSC staff members noted no significant decrease in cocaine usage.[23]

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[14] *Id.* at 86.

[15] *See infra* Part II.

[16] *See infra* Part III.

[17] *See infra* Part IV.A.

[18] *See infra* Parts IV.B., V.

[19] Ferguson v. City of Charleston, 532 U.S. 67, 70 n.1 (2001).

[20] *Id.* at 70; *see also* 2000 WL 1341474, at 5 (Resp'ts Br.) (noting the local effect of the cocaine problem on pregnant women and citing a study indicating approximately 3221 infants per year during that period had suffered prenatal exposure to cocaine in South Carolina).

[21] *Ferguson*, 532 U.S. at 70.

[22] *Id.*

[23] *Id.*; *see also* 2000 WL 1341474, at 6 (Resp'ts Br.) (noting that virtually none of the patients referred to counseling followed through with their treatment).

Approximately four months later, the general counsel of MUSC contacted the Charleston Solicitor, Charles Condon, to offer the hospital's assistance in prosecuting mothers whose children tested positive for cocaine at birth.[24] Condon subsequently created a task force consisting of MUSC officials, the City of Charleston Police Department, the Department of Social Services, and the County Substance Abuse Commission.[25]

Deliberations of the task force resulted in MUSC's adoption of a formal policy dealing with patient drug use during pregnancy.[26] The policy provided that a patient would be tested if she met one or more of nine established criteria indicating possible drug use.[27] Additionally, the policy required that a chain of custody be followed in testing the urine samples in order to preserve their evidentiary value.[28] Further, the policy provided that patients testing positive would be referred for substance abuse treatment.[29] Most significantly, the policy included the threat of prosecution of those failing to comply with treatment recommendations.[30] Notably, the policy was silent as to recommended

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[24] *Ferguson*, 532 U.S. at 70-71. This action was taken after one of MUSC's employees learned that police in Greenville, South Carolina, were charging pregnant women who used cocaine under the state's child abuse statute. 2000 WL 728149, at 3 (Pet'rs Br.). Under South Carolina law, a viable fetus is considered a child. *See* Whitner v. South Carolina, 492 S.E.2d 777, 780 (S.C. 1997) (finding that a fetus is a "person" with respect to statutes proscribing child abuse); South Carolina v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that, although inapplicable in the case at bar, state law permits action for homicide based on the killing of a viable fetus).

[25] *Ferguson*, 532 U.S. at 71.

[26] *Id.*

[27] *Id.* These criteria included the following medical symptoms indicative of drug use: "1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5. Intrauterine fetal death; 6. Preterm labor of 'no obvious cause'; 7. IUGR of 'no obvious cause'; 8. Previously known drug or alcohol abuse; or 9. Unexplained congenital anomalies." 2000 WL 1341474, at 8 (Resp'ts Br.). Despite these criteria, the case was viewed by the Court as involving suspicionless searches, lacking probable cause or any individualized suspicion. *Ferguson*, 532 U.S. at 76.

[28] *Ferguson*, 532 U.S. at 71-72; 2000 WL 728149, at 4 (Pet'rs Br.).

[29] *Ferguson*, 532 U.S. at 72.

[30] *Id.* MUSC viewed this requirement as essential to provide the leverage necessary to make the program effective. *Id.* The policy initially provided that patients found to be using cocaine during pregnancy would only be arrested following a second positive test or a missed counseling appointment, but that patients found using after labor would be arrested immediately. *Id.* This policy was later amended to provide a treatment option to all patients prior to arrest. *Id.* MUSC's policy also provided procedures for the police to follow when arresting patients and articulated the specific offenses that patients could be

changes in prenatal care of patients found to be using cocaine and the medical treatment of infants born to mothers who used the drug.[31]

The plaintiffs in *Ferguson* were ten female MUSC patients who had been arrested after providing urine samples that tested positive for cocaine.[32] In addition to other claims, a Section 1983 action was brought against representatives of MUSC, the City of Charleston, and law enforcement officials who helped to develop and enforce the hospital's policy.[33] The action alleged that the drug tests administered pursuant to the policy were violative of the Fourth Amendment.[34] At trial, the defendants argued that the plaintiffs had in fact consented to the searches by voluntarily providing the urine samples.[35] Alternatively, the defendants contended that the searches were reasonable, even if nonconsensual, under the special needs exception.[36]

The district court held that as the searches were conducted for law enforcement purposes, the special needs exception was inapplicable.[37] However, it submitted the consent defense to the jury, who found for the defendants.[38] On appeal, the Fourth Circuit affirmed without reaching the issue of consent, finding instead that the searches were reasonable under the special needs doctrine.[39]

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charged with, depending on the stage of pregnancy at which the mother's cocaine use was detected. *Id.*; 2000 WL 728149, at 16 (Pet'rs Br.). The policy also instructed police to interrogate the patients in an attempt to determine the identity of the person providing the illicit drugs. *Ferguson*, 532 U.S. at 73.

[31] *Ferguson*, 532 U.S. at 73.

[32] *Id.*

[33] 2000 WL 728149, at 19 (Pet'rs Br.). Section 1983 provides a remedy to those whose constitutional rights, privileges, or immunities have been violated "under color of" state law. 42 U.S.C. § 1983 (1994).

[34] 2000 WL 728149, at 19 (Pet'rs Br.). Although part of the United States Constitution, the Fourth Amendment has been found to apply to the states through the Due Process Clause of the Fourteenth Amendment. *See* Elkins v. United States, 364 U.S. 206, 213 (1960); Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949).

[35] *Ferguson*, 532 U.S. at 73.

[36] *Id.* The defendants cited two distinct special needs for screening its maternity patients for cocaine use. 2000 WL 1341474, at 3 (Resp'ts Br.). First, a clinical need was argued to be necessary in order for doctors to provide effective medical treatment to the mother and the fetus. *Id.* Second, the defendants suggested a larger social need existed to deter maternal drug use and its effects. *Id.*

[37] *Ferguson*, 532 U.S. at 73-74. The opinion of the District Court was not reported.

[38] *Id.* at 74.

[39] Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999).

The United States Supreme Court granted certiorari, reversed, and remanded the case for a finding on the issue of consent.[40] Regarding special needs, the Court held that the searches at issue constituted a far greater invasion of privacy than the searches in four previous cases in which the Court considered suspicionless drug testing programs.[41] The Court further held that, in contrast to earlier precedents, the special need asserted by the defendants in *Ferguson* was not sufficiently divorced from the state's general interest in law enforcement.[42] Therefore, the drug tests fell outside the Court's previously established special needs exception.[43]

## III. LEGAL BACKGROUND OF FERGUSON v. CITY OF CHARLESTON

Traditionally, the Supreme Court held that the reasonableness requirement of the Fourth Amendment could be fulfilled only by obtaining a warrant from a neutral magistrate upon a showing of probable cause.[44] Beginning in the 1960s, however, the Court began to recognize a number of exceptions to the general rule requiring the presence of a warrant and probable cause in nonconsensual searches.[45] *Frank v. Maryland*[46] represents the first instance in which a governmental search conducted without a warrant was upheld. In *Frank*, the Court found the Fourth Amendment inapplicable to housing inspectors whose civil, regulatory searches were not conducted for the purpose of

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[40] *Ferguson*, 532 U.S. at 76. Certiorari was granted at *Ferguson v. City of Charleston*, 528 U.S. 1187 (2000).

[41] *Ferguson*, 532 U.S. at 77-78 (citing Chandler v. Miller, 520 U.S. 305 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989)).

[42] *Id.* at 84.

[43] *Id.*

[44] Buffaloe, *supra* note 3, at 530. Debate continues regarding whether the Fourth Amendment was intended by the Framers to require the presence of a warrant in all government searches. This is due to the wording of the text of the amendment which separates two clauses: the Reasonableness Clause and the Warrant Clause. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761, 765-67 (1994) (suggesting that reasonableness only is required under the amendment). *But see* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 397-400 (1974) (suggesting that the history surrounding the adoption of the Fourth Amendment supports the view that the Framers intended to require warrants in all government searches).

[45] Buffaloe, *supra* note 3, at 530. Buffaloe suggests that the Court found this change necessary to provide increased flexibility for non-traditional applications of the Fourth Amendment, such as the frisks at issue in *Terry v. Ohio*, 392 U.S. 30 (1968). *Id.*

[46] 359 U.S. 360 (1959).

collecting evidence to be used in criminal prosecutions.[47] Eight years later, however, the Court overruled *Frank*.[48] In *Camara v. Municipal Court*,[49] the Court held that the Fourth Amendment's protections extended to searches conducted under civil, as well as criminal justifications.[50] However, the Court recognized that in some instances, forcing the government to comply with the warrant and probable cause requirements would often make needed civil inspections impossible.[51] Because such inspections were required for the public good, but unworkable under a probable cause standard, the Court suggested it would be necessary to engage in balancing the governmental and individual interests to determine the reasonableness of such a search.[52]

In 1985, the Court took a substantial step toward establishing the balancing test as the new standard for determining the reasonableness requirement.[53] In *New Jersey v. T.L.O.*,[54] the Court found a principal's warrantless search of a student's purse to be reasonable.[55] Finding the warrant requirement to be particularly unsuited to the educational

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[47] *Id.* at 365.

[48] *See* Camara v. Mun. Court, 387 U.S. 523, 534 (1967).

[49] 387 U.S. 523 (1967).

[50] *Id.* at 534. The *Camara* Court considered a writ to prohibit the prosecution of a defendant who refused to allow San Francisco Department of Public Health officials to inspect his home without a warrant. *Id.* at 525-27. In both *Camara* and its companion case, the Court held that warrantless administrative safety inspections constituted significant intrusions on privacy that were protected by the Fourth Amendment's warrant requirement. *Id.* at 534; *see also* See v. City of Seattle, 387 U.S. 541, 545 (1967).

[51] *Camara*, 387 U.S. at 537.

[52] *Id.* at 536-37. The Court stated "[u]nfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* Since *Camara* was decided, several well-defined exceptions to the warrant and probable cause requirements have been developed by the Court. *See* Andrew P. Massman, Note, *Drug Testing High School and Junior High School Students After* Vernonia School District 47J v. Acton*: Proposed Guidelines for School Districts*, 31 VAL. U. L. REV. 721, 734 (1997). For example, warrants are not required when border searches are being conducted, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985), when the search involves an administrative search of a closely regulated industry, United States v. Biswell, 406 U.S. 311, 317 (1972), by police officers that stop and frisk a suspect with reasonable suspicion, Terry v. Ohio, 392 U.S. 1, 30 (1968), or when officers are in hot pursuit of a suspect, Warden v. Hayden, 387 U.S. 294, 298 (1967).

[53] Harlin Ray Dean, Jr., Note, National Treasury Employees Union v. Von Rabb*: The Fourth Amendment Hangs in the Balance*, 68 N.C. L. REV. 389, 397 (1990).

[54] 469 U.S. 325 (1985).

[55] *Id.* at 343. The search in *T.L.O.*, conducted after the student was found smoking, revealed marijuana and drug paraphernalia. *Id.* at 328.

environment, the Court, citing the *Camara* balancing precedent, held that the legality of the search depended merely on its reasonableness under the totality of the circumstances.[56] It was in Justice Blackmun's concurrence that the special needs doctrine had its genesis.[57] Justice Blackmun disagreed with the Court's implication that balancing should be the rule rather than the exception.[58] Furthermore, Justice Blackmun asserted that the Court had erred by proceeding directly to the balancing analysis without first considering the need for the warrantless search.[59] Justice Blackmun felt that only in "exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[60]

Two years later, the Court adopted Justice Blackmun's special needs terminology in *O'Connor v. Ortega*.[61] In *O'Connor*, the Court considered the constitutionality of a warrantless search of a state employee's desk by his employer, prompted by the employee's misconduct. Using a special needs analysis, the Court reasoned that the employer's interest in searching was other than "the normal need for law enforcement."[62] The Court further reasoned that a warrant requirement would impose intolerable burdens on public employers.[63] Applying the balancing test, the Court found the governmental interests outweighed the intrusion into the employee's privacy and, therefore, found the search to be constitutional.[64] Notably, Justice Blackmun dissented from the Court's opinion.[65] He felt the Court had merely recited a special need rather than actually identified one and had erred in weighing the public and

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[56] *Id.* at 340, 342.
[57] Ferguson v. City of Charleston, 532 U.S. 67, 76 n.7 (2001).
[58] *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring).
[59] *Id.* at 351 (explaining that the Court had previously only applied a balancing analysis when "confronted with 'a special law enforcement need for greater flexibility'").
[60] *Id.* (emphasis added).
[61] 480 U.S. 709 (1987).
[62] *Id.* at 724.
[63] *Id.*
[64] *Id.* at 725.
[65] *Id.* at 732 (Blackmun, J., dissenting).

private interests.[66] Indeed, these criticisms would continue to plague the Court's future special needs decisions.[67]

The next special needs case decided by the Court significantly blurred the distinction between searches conducted for traditional law enforcement purposes and those conducted for other governmental purposes.[68] In *Griffin v. Wisconsin*,[69] the Court upheld the warrantless search of a probationer's home by probation officials.[70] The search resulted in the probationer's prosecution and conviction for a weapons offense.[71] Rather than relying on several other available substantive arguments to affirm the probationer's conviction, the Court instead invoked its newly-created special needs doctrine.[72] The Court held that the state's operation of a probation system presented needs beyond those of normal law enforcement.[73] These needs, the Court continued, were sufficient to invoke a special needs balancing analysis to determine the

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[66] *Id.* at 741-47.

[67] *See generally* Ames, *supra* note 11, at 288 (asserting that "special needs" became merely a phrase the Court would invoke to explain that the search was not related to the "normal needs" of law enforcement); Dean, *supra* note 53, at 404 (arguing that a central defect of the special needs balancing test is its susceptibility to the Justices' subjective beliefs). Dean suggests that the presence of the Justices' subjective opinions have become apparent in the special needs opinions. Dean, *supra* note 53, at 404. Dean notes that Chief Justice Rehnquist consistently gives more weight to government interests while Justices Marshall and Brennan gave more weight to privacy concerns. *Id.* Judicial balancing even outside the special needs arena is controversial. Inherently defective in a balancing approach is that "[e]ach judge, due to individual observations, training, and experience, inevitably will view each situation and its unique facts from a different perspective" and "no safeguards prevent a judge from manipulating the factors to reach a result he desires." *Id.* at 403. *But see* Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22-25 (1988) (defending balancing by suggesting that its subjective bias element can be minimized by judicial care in opinion writing).

[68] *See* Buffaloe, *supra* note 3, at 539.

[69] 483 U.S. 868 (1987).

[70] *Id.* at 880. The search was conducted pursuant to the probation department's policy and Griffin's conditions of probation after information was provided to probation authorities by police that Griffin was in possession of weapons. *Id.* at 870-71.

[71] *Id.* at 872.

[72] *Id.* at 873-74. The Court's reliance on special needs in *Griffin* has been criticized because more substantial bases for finding the search constitutional existed. *See* Buffaloe, *supra* note 3, at 551. Buffaloe points out that warrant and probable cause requirements are inapplicable to those in custody and that the Court could have extended this logic to those on probation on a "constructive custody" theory. *Id.* She also suggests that the Court could have found that probationers waive their Fourth Amendment rights by accepting a term of probation rather than a sentence of imprisonment. *Id.*

[73] *Griffin*, 483 U.S. at 873-74.

search's reasonableness.[74] Again, Justice Blackmun dissented.[75] Justice Blackmun stated that a balancing analysis was only to be invoked under special needs if obtaining a warrant would be impracticable.[76] Despite Justice Blackmun's attempts to restrain the spread of the special needs exception, the Court soon extended the doctrine to a series of cases involving suspicionless drug testing.[77]

*Skinner v. Railway Labor Executives' Ass'n*[78] presented the first opportunity to consider the special needs exception within the context of governmental drug testing programs. In *Skinner*, the Court upheld regulations of the Federal Railroad Administration.[79] These regulations required blood and urine tests of railroad employees following major train accidents.[80] The Court first determined that the collection and testing of urine was a search within the meaning of the Fourth Amendment.[81] The Court then found that the government's interest in ensuring railroad safety by regulating railroad employees was, indeed, beyond the normal needs of law enforcement.[82] After applying the balancing test, the Court determined that the government's interests were sufficiently compelling to obviate the normal requirement of individualized suspicion.[83] Concerning individual interests, the Court

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[74] *Id.* at 874.

[75] *Id.* at 881 (Blackmun, J., dissenting).

[76] *Id.* Quoting his own dissenting opinion in *O'Connor*, Justice Blackmun reminded the majority that "'[o]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a 'balancing' test to formulate a standard of reasonableness . . . .'" *Id.* (quoting O'Connor v. Ortega, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting)).

[77] Smiley, *supra* note 5, at 817.

[78] 489 U.S. 602 (1989).

[79] *Id.* at 634.

[80] *Id.* at 609.

[81] *Id.* at 617. "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Id.* (citing, *inter alia*, Lovvorn v. Chattanooga, 846 F.2d 1539 (6th Cir. 1988); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987)).

[82] *Id.* at 620. The Court considered whether the results of the drug tests could be turned over to law enforcement authorities and determined that, although nothing in the regulations prevented such action, the record failed to show that results were intended to be provided to police or ever had been. *Id.* at 621 n.5.

[83] *Id.* at 624. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest . . . would be placed in

regarded the intrusion on the employees' privacy as minimal.[84] Obviously concerned about the ever-widening scope of the special needs exception, Justice Marshall wrote a vigorous dissenting opinion.[85] Justice Marshall accused the majority of taking "its longest step yet toward reading the probable cause requirement out of the Fourth Amendment."[86] Justice Marshall felt that the decision in *Skinner* was merely a reaction to the nationally perceived drug problem.[87] He invoked Justice Holmes' view regarding the dangers of allowing settled principles of law to become malleable in the face of pressing national problems, and warned that "principles of law, once bent, do not snap back easily."[88]

In *National Treasury Employees Union v. Von Raab*,[89] a companion case to *Skinner*, the Court reached the same conclusion. In *Von Raab*, the Court considered a drug testing program of the United States Customs Service.[90] The Court found that because the Customs employees routinely dealt with drugs and the criminal element, the government had a "compelling interest in ensuring that front-line interdiction personnel [were] physically fit, and [had] unimpeachable integrity and judgment."[91] As such, a special need was clearly present.[92] With respect

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jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* The Court's departure from the individualized suspicion requirement in *Skinner* has been the subject of much criticism. *See, e.g.*, Darren K. Sharp, Note, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 DRAKE L. REV. 149 (1997).

[84] *Skinner*, 489 U.S. at 627 (finding intrusion to be minimal due to the diminished expectations of privacy held by employees in a heavily regulated industry).

[85] *Id.* at 635 (Marshall, J., dissenting).

[86] *Id.* at 636.

[87] *Id.* at 654. Justice Marshall compared the majority's decision in *Skinner* to those of "shortsighted courts" in the past which had allowed the internment of Japanese-Americans during World War II and had perpetuated the McCarthy-era Red Scare. *Id.* at 635. He warned that "[p]recisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Id.*

[88] *Id.* at 654-55, (quoting N. Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)). Justice Holmes' quotation, from his first dissenting opinion as a member of the Court, is reprinted at the outset of this Comment. *See supra* text accompanying note 1.

[89] 489 U.S. 656 (1989).

[90] *Id.* at 660-61. Under the program, drug testing was to be performed on Customs employees who applied for positions involving drug interdiction, those who carried firearms, or those handling classified material. *Id.*

[91] *Id.* at 670.

to the privacy interests of Customs employees, the Court found that the employees had diminished expectations of privacy and, therefore, held the program was reasonable.[93]

While the *Skinner* and *Von Rabb* decisions were soundly criticized,[94] perhaps more controversial was the Court's decision in *Vernonia School District 47J v. Acton*.[95] In *Vernonia*, an Oregon school district had adopted a random drug testing policy for its student athletes.[96] This policy was adopted in response to general concerns about an increase in drug usage in the school system, especially among athletes, and information that the use of drugs increased the risk of sports-related injuries.[97] In considering the constitutionality of this program, the Court bypassed a special needs analysis. Instead, the Court merely stated that special needs had previously been approved in the public school context.[98] Focusing on the balancing test, the Court found that student athletes subjected to the program had diminished expectations of privacy.[99] Meanwhile, the

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[92] *Id.* at 666 (noting that the need was beyond that of normal law enforcement because the program did not permit the use of drug test results in a criminal prosecution without the consent of the employee).

[93] *Id.* at 671, 679. Justice Scalia, joined by Justice Stevens, dissented from the majority's opinion. *Id.* at 680 (Scalia & Stevens, J.J., dissenting). Justice Scalia noted that unlike all of the Court's prior special needs cases, no special need existed because no documented instances of corruption, caused by drug use of customs employees, had been recorded. *Id.* at 680-84.

[94] *See, e.g.*, Dean, *supra* note 53, at 409 (suggesting that *Von Rabb* eliminated the reasonableness requirement of the Fourth Amendment for the sake of government convenience). *But see* Daniel J. Fritze, Comment, *Drug Testing of Government Employees and Government-Regulated Industries: Expounding the Fourth Amendment*, 25 WAKE FOREST L. REV. 831, 859 (1990) (finding *Skinner* and *Von Rabb* to be "logical extensions of pre-existing law that reasonably expound the fourth amendment").

[95] 515 U.S. 646 (1995). *See* David J. Gottlieb, *Drug Testing, Collective Suspicion, and a Fourth Amendment out of Balance: A Reply to Professor Howard*, 6 KAN. J.L. & PUB. POL'Y 27, 35 (Winter 1997) (discussing *Vernonia*'s controversial nature). Gottlieb states:

> [In *Vernonia*] [t]he Court thus declared as constitutional a policy requiring the mandatory testing of thousands of pre-high school children, under conditions more degrading than those permitted in *Skinner* and *Von Rabb*, in a situation where general public safety was not endangered, based on an 'epidemic' that the school board had never demonstrated . . . .

*Id.*

[96] *Vernonia*, 515 U.S. at 648-49.

[97] *Id.*

[98] *Id.* at 653 (referring to *T.L.O.*).

[99] *Id.* at 657. The Court stated that, due to "communal undress" in locker rooms, school athletics were "not for the bashful." *Id.*

Court found the government's interest to be at least as important as that at stake in *Von Rabb* and *Skinner*.[100] Because of its apparent lack of principled objective analysis, *Vernonia* caused many to question the Court's special needs jurisprudence.[101] The balancing test, which appeared to many far too malleable and subjective, received the brunt of the attack.[102]

Most recently, the Court decided *Chandler v. Miller*,[103] a case involving the drug testing of candidates for certain Georgia public offices. *Chandler* represents the first occasion the Court struck down a suspicionless drug testing policy under a special needs approach.[104] The majority opinion, written by Justice Ginsburg, never reached the

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[100] *Id.* at 661. Justice Scalia, who wrote the Court's opinion, has been accused of extravagantly exaggerating the risks faced by the Vernonia students and the justifications for the school district's policy by comparing student drug use to the situations in *Skinner* and *Von Raab*, where drug use could potentially endanger hundreds of lives. *See* Gottlieb, *supra* note 95, at 34. Citing a lack of individualized suspicion or a showing that a warrant requirement would be impractical, as well as a lack of specific evidence of drug use in the grade school to which the program was extended, Justice O'Connor wrote a dissenting opinion which was joined by Justices Stevens and Souter. *Vernonia*, 515 U.S. at 667-86 (O'Connor, Stevens, & Souter, J.J., dissenting).

[101] *See generally* Gottlieb, *supra* note 95, at 27-28 (referring to *Vernonia* as "yet another example of the poverty of analysis that accompanies the Court's current 'balancing' test . . . ."); Joaquin G. Padilla, Comment, Vernonia School District 47J v. Acton: *Flushing the Fourth Amendment - Student Athletes' Privacy Interests Go Down the Drain*, 73 DENV. U. L. REV. 571 (1996); Sherri L. Toussaint, Note, *Something is Terribly Wrong Here:* Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 75 NEB. L. REV. 151 (1996); Rhett Traband, *The* Acton *Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 DICK. L. REV. 1 (1995).

[102] *See* George M. Dery III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 88-89 (1998). Dery observes:

> The special needs balancing analysis is not truly an analysis at all. It merely demonstrates whether or not as few as five members of the Court value a particular government action. . . . Facts can be emphasized or ignored in order to achieve a preordained result. If the Court determines that a particular government behavior should be permitted, it simply highlights the state's interests and minimizes those of the individual.

*Id.*; *see also* Gottlieb, *supra* note 95, at 28 (observing that the Court's balancing test invariably resulted in a devaluing of private interests while governmental interests are overvalued by discussing the general social problem being addressed by the search policy, rather than the particular needs of the testing scheme at issue).

[103] 520 U.S. 305 (1997).

[104] Smiley, *supra* note 5, at 824.

balancing analysis.[105] Instead, the Court articulated a new standard for what constitutes a special need.[106] The Court found that, unless the government interest meets a minimum threshold of importance, the search would be deemed unreasonable without reaching the balancing test.[107] Applying this new standard, the Court found the government's interest in drug testing candidates for public office to be merely a symbolic gesture against drug use rather than a special need deserving of a waiver of the warrant requirement.[108]

The *Chandler* Court indicated a desire to limit its special needs exception and return to a truer interpretation of Justice Blackmun's doctrine.[109] However, by invoking its earlier precedents to achieve the result in *Chandler* rather than overruling or modifying them, the Court suggested that *Chandler* was distinguishable on its facts when, in reality, the testing program was indistinguishable from the one at issue in *Von Rabb* and likely would have been upheld had the Court remained true to its earlier interpretation of the special needs doctrine.[110] While *Chandler* clearly represented a retreat from the special needs doctrine, its end result was to muddle the exception, leaving courts confused as to its application.[111]

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[105] Ames, *supra* note 11, at 288.

[106] *Id.*

[107] *Id.*

[108] *Chandler*, 520 U.S. at 321-22. "What is left, after a close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse .... The need revealed, in short, is symbolic, not 'special' ...." *Id.* *See* Eric B. Post, Comment, Chandler v. Miller: *Drug Testing Candidates for State Office Under the "Special Needs" Exception*, 64 BROOK. L. REV. 1153, 1173-74 (1998) (stating that Chandler was wrongly decided and that ensuring that high public office holders are drug-free constitutes a special need).

[109] *See* Dery, *supra* note 102, at 74; *see also* Justin Scott, Case Note, Chandler v. Miller: *The Supreme Court Closed the Door on the Factual Instances that Warrant Suspicionless Searches*, 49 MERCER L. REV. 1131, 1138 (1998) ("In *Chandler* the Court once again breathed life into the Fourth Amendment, taking a small step toward reading the probable cause requirement back into the Constitution.").

[110] Ames, *supra* note 11, at 294; *see also* Ross H. Parr, Note, *Suspicionless Drug Testing and* Chandler v. Miller: *Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241 (1998) (arguing that the Court was unsuccessful in distinguishing *Chandler* from the special needs precedents). Indeed, Chief Justice Rehnquist stated that it was only through distorting the prior special needs cases that the majority was able to find special needs inapplicable to the Georgia statute. *Chandler*, 520 U.S. at 327 (Rehnquist, C.J., dissenting).

[111] Smiley, *supra* note 5, at 825-26.

## IV. ANALYSIS OF FERGUSON v. CITY OF CHARLESTON

### *A. The Ferguson Opinion*

It was within this developing special needs framework that the Court analyzed *Ferguson.* Written by Justice Stevens, the majority opinion attempts to distinguish *Ferguson* from the Court's earlier precedents that considered the constitutionality of suspicionless drug testing.[112] The Court noted that the intrusion on privacy at issue was much greater than had been considered in *Skinner, Von Raab, Vernonia,* or *Chandler.*[113] The Court found that those cases were readily distinguishable as they had involved no misunderstanding as to the purpose of the intrusion.[114] Additionally, the Court held that the plaintiffs in *Ferguson,* hospital patients, enjoyed a greater expectation of privacy than did those subjected to urine tests in *Skinner, Von Rabb, Vernonia,* or *Chandler.*[115] However, the Court stated that the crucial difference between *Ferguson* and its earlier precedents involved the nature of the special need at stake.[116] Unlike the asserted special needs in *Skinner, Von Rabb, Vernonia,* or *Chandler,* which the Court found to be divorced from the state's general interest in law enforcement, the Court found that MUSC's policy used law enforcement and the threat of prosecution from its inception in order to compel compliance with the program's mandates.[117]

Responding to the dissent's assertions that the policy's purpose was to protect the health of the patients and their unborn children, the Court

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[112] Ferguson v. City of Charleston, 532 U.S. 67, 77-81 (2001).

[113] *Id.* at 78. It is worth noting that in order to present the prior special needs cases as a consistent body of law, the majority in *Ferguson* found it necessary to cite the dissenting opinion in *Chandler. Id.* at 80 n.17 (citing *Chandler,* 520 U.S. at 325 (Rehnquist, C.J., dissenting)).

[114] *Id.* at 78 (noting also that protections had existed in those earlier cases which prevented the dissemination of the testing results to third persons). *But see infra* note 130 (discussing the relevance of whether or not test results could be reported to police to the Court's decisions in the prior cases).

[115] *Ferguson,* 532 U.S. at 78. The Court's mention of privacy interests here adds additional confusion to the majority opinion as privacy interests had previously only been analyzed in the special needs cases once the Court endeavored to apply the balancing test. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995); Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 672 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989).

[116] *Ferguson,* 532 U.S. at 79.

[117] *Id.* at 80.

found it necessary to distinguish between the policy's "ultimate goal" and its "immediate objective."[118] The majority found it critical that, while the ultimate goal of the policy may have been to reduce cocaine use among expectant women, its immediate objective was to obtain evidence to be used against them.[119] This, the majority reasoned, was evidenced by policy language that dealt more with law enforcement procedures than with medical treatment, and by the extensive police and prosecutorial involvement in the policy's development.[120] Noting that the policy's primary purpose was to generate inculpatory evidence, the Court held that the program did not fall within the special needs exception.[121] Therefore, the majority did not reach a balancing analysis of MUSC's program.

The majority opinion, while reasonable on its surface, leaves questions for those acquainted with prior special needs cases. Can it really be the case that women undergoing intensely invasive obstetrical examinations have a greater expectation of privacy than student athletes, railroad employees, or customs officials? Is it such a stretch to imagine, for a cocaine-using maternity patient, that drug use would be discovered during the course of numerous medical tests? Further, is it unreasonable to assume that, if discovered, such drug use would be reported to police? Did the Court, despite its attempts to avoid a balancing of private and governmental interests, in fact apply the balancing test by considering the privacy expectations of the plaintiff maternity patients?[122]

In his concurring opinion, Justice Kennedy was unable to view the "ultimate goal" versus "immediate objective" distinction as critical.[123] Justice Kennedy noted that this distinction had no foundation in any of the prior special needs cases, all of which turned on what was now being

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[118] *Id.* at 82.

[119] *Id.* at 82-83. "Because law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual, suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose." *Id.* at 84. *But see supra* note 102 (suggesting that the Court routinely had identified the government's need for the search in broad societal terms in prior cases).

[120] *Ferguson*, 532 U.S. at 82.

[121] *Id.* at 84.

[122] *See supra* note 115 (noting the Court's inconsistency in evaluating the plaintiffs' privacy expectations).

[123] *Ferguson*, 532 U.S. at 86-87 (Kennedy, J., concurring).

termed the "ultimate goal."[124] Rather, Justice Kennedy believed the distinction between *Ferguson* and the Court's earlier precedents was that none of the latter cases had tolerated the routine and active inclusion of law enforcement officials.[125] Further, Justice Kennedy stated that in the previous cases the test-subject at least had been put on notice that drug-screening was to take place.[126] With his opinion, Justice Kennedy seems willing to go where the majority will not. Not wanting to create additional confusion to the special needs doctrine by recognizing the majority's "ultimate goal" distinction, his opinion instead suggests what seems to actually be motivating the Court: that the level of police and prosecutorial involvement in MUSC's policy simply goes beyond what the Fourth Amendment can bear in terms of reasonableness. However, striking down the policy was not an easy thing to accomplish in light of the special needs precedents, an observation not lost on the dissenting members of the Court.

Justice Scalia penned a dissenting opinion which was joined in part by Chief Justice Rehnquist and Justice Thomas.[127] Noting that MUSC's drug testing policy had originally developed in response to concerns over increased drug use, and only later included law enforcement, Justice Scalia asserted that the testing program fell within the special needs exception.[128] Justice Scalia also uncovered an important inconsistency in the Court's precedent. He noted that *Griffin* had previously invoked special needs to approve the search of a probationer's home, conducted in response to information provided by law enforcement officers, and at which police were present.[129] Likening the MUSC officials to the probation officials in *Griffin*, Justice Scalia

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[124] *Id.* at 87.

[125] *Id.* at 88.

[126] *Id.* at 90-91. Justice Kennedy felt that such implied consent to drug testing by those tested went to the reasonableness of the testing programs. *Id.* at 91.

[127] *Id.* (Scalia, J., dissenting). Only Part II of Justice Scalia's dissent was joined by Justice Thomas and Chief Justice Rehnquist. *See id.* at 98-104 (Scalia & Thomas, J.J., & Rehnquist, C.J., dissenting). Part I, representing Justice Scalia alone, asserted that the plaintiffs had in fact consented to the drug tests. *Id.* at 91-98 (Scalia, J., dissenting).

[128] *Id.* at 99-100 (Scalia & Thomas, J.J., & Rehnquist, C.J., dissenting). Justice Scalia's approach to special needs perhaps demonstrates the doctrine's subjectivity. Justice Scalia appears rather schizophrenic in the special needs cases, alternately approving and disapproving of the testing programs at issue in *Skinner*, *Von Rabb*, *Vernonia*, and *Chandler*. *See generally* Smiley, *supra* note 5, at 835 n.196.

[129] *Ferguson*, 532 U.S. at 100-01. *See supra* note 70 (discussing police involvement in the search in *Griffin*).

asserted that the special needs doctrine did not prohibit the involvement of law enforcement officials in a warrantless search.[130] Therefore, Justice Scalia concluded that the majority had erred in finding the two cases distinguishable.[131]

*B. Ferguson's Meaning for Special Needs*

Justice Scalia's argument concerning *Griffin* is not without merit and is suggestive of the larger problem facing the *Ferguson* Court: while the testing program undertaken by MUSC was found by the majority to be distasteful, inconsistencies in the prior special needs cases did not provide a clear basis for finding the program unconstitutional. Certainly, had a pre-*Chandler* analysis been applied and a balancing test been undertaken, the Court would have had no choice but to approve MUSC's policy.[132] The governmental interest in preventing harm to both pregnant women and unborn children could hardly be denied to be at least as compelling as the need to test the customs officials in *Von Rabb*. Likewise, the privacy expectations of women undergoing obstetrical examinations would necessarily be at least as diminished as those of the students in *Vernonia*.[133] Even following *Chandler*, it seems likely that MUSC's policy would have been upheld had the Court remained true to the preexisting special needs framework. Surely, the hospital's need to protect its patients and their unborn children from the harmful effects of cocaine would meet *Chandler*'s "threshold of significance" requirement. It likely was due to these prior inconsistencies that the majority, in order to preempt any balancing analysis and strike down MUSC's testing program, found it necessary to create the "ultimate goal" versus

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[130] *Ferguson*, 532 U.S. at 100-01. The majority attempted to address this charge in a footnote by maintaining that none of the previous special needs cases had tolerated a *significant* level of law enforcement involvement, that the *Griffin* Court had not addressed whether *routine* police involvement would preclude a special needs analysis, and that the probationer at issue in *Griffin* had a lesser expectation of privacy than did the patients in *Ferguson*. *Id.* at 81 n.15 (majority opinion). Prior to *Ferguson*, the Court had not been clear as to whether a search conducted under special needs could properly lead to criminal prosecution. Carmen Vaughn, Note, *Circumventing the Fourth Amendment Via the Special Needs Doctrine to Prosecute Pregnant Drug Users:* Ferguson v. City of Charleston, 51 S.C. L. REV. 857, 868 (2000) (observing that whether or not urine test results were disclosed to law enforcement officers or prosecutors had been considered by the Court in both *Von Rabb* and *Vernonia*, but had not been dispositive in either case).

[131] *Ferguson*, 532 U.S. at 101-02 (Scalia & Thomas, J.J., & Rehnquist, C.J., dissenting).

[132] This was alluded to by Justice Scalia in the dissenting opinion. *See id.*

[133] *See supra* note 99 and accompanying text (discussing the *Vernonia* Court's rationale for finding diminished privacy concerns among student athletes).

"immediate purpose" distinction. However, in doing so, the Court created additional uncertainty in an area already highly criticized for its incongruity.[134] Far from being the panacea for the special needs exception some hoped it would be, *Ferguson* removed none of the post-*Chandler* confusion surrounding the exception.[135]

The Court in *Ferguson* reached the correct result. Clearly the Fourth Amendment cannot sanction the type of officious behavior displayed by MUSC. Had the testing in *Ferguson* been upheld by the Court, it surely would not have been long until other governmental officials, at the behest of law enforcement, began similar testing programs designed to skirt traditional warrant and probable cause requirements.[136] However, the Court failed to seize the opportunity presented by *Ferguson* to address the inconsistencies plaguing the special needs doctrine. At a minimum, the Court should have acknowledged that *Griffin* was wrongly decided under special needs. Having done so, the Court could have established a clear rule that law enforcement involvement of any kind in a warrantless search would not be permitted under the special

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[134] *See, e.g.*, Smiley, *supra* note 5, at 826 (noting that the special needs cases, because of their inconsistencies, are nearly impossible to reconcile with one another). *But see* Michael E. Brewer, Comment, Chandler v. Miller: *No Turning Back from a Fourth Amendment Reasonableness Analysis*, 75 DENV. U. L. REV. 275, 304 (1997) (arguing that the Court's special needs approach is "a legitimate response to exigencies and situations not envisioned or contemplated by the Framers" and that the balancing test's "reasonableness standard lacks the definition and precision of the probable cause standard in part because it has not had the time and opportunity to ripen and mature").

[135] *See* Bryony J. Gagan, Ferguson v. City of Charleston, South Carolina: *'Fetal Abuse,' Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 511-12 (2000) (speculating that Ferguson would provide clarity to the special needs doctrine). "It is tempting to hope that the Court has finally recognized that the 'special needs' exception threatens to swallow the warrant preference rule, and will take the opportunity [presented by *Ferguson*] to narrow the scope of the exception." *Id.* Gagan also refers to *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), as a 'special needs' case which the Court could use in conjunction with *Ferguson* as an opportunity to clarify the special needs doctrine. *Id.* at 494, 512. *Edmond* involved the use of random drug interdiction checkpoints on roadways by the Indianapolis Police Department. *Edmond*, 531 U.S. at 34-35. While *Edmond* was decided by the Court approximately four months prior to *Ferguson*, the City of Indianapolis did not attempt to justify the checkpoint program under the special needs doctrine. *See id.* at 42-47. Furthermore, the Court primarily analyzed *Edmond* in light of its "checkpoint cases" and not squarely within the context of special needs. *Id.* at 41.

[136] *Cf.* United States v. Smith, 978 F.2d 171, 173 (5th Cir. 1992) (addressing police using burglary suspect's neighbor and a cordless telephone to circumvent wiretapping laws).

needs exception.[137] Instead, by attempting to distinguish *Ferguson* on its facts, the Court not only perpetuated the myth that all is well with the special needs exception, but also provided little guidance to lower courts faced with the challenge of attempting to apply it.

## V. CONCLUSION

Since the Court abandoned the traditional warrant requirement of the Fourth Amendment, confusion has naturally resulted. This confusion has found expression in the Court's special needs doctrine: a doctrine that early in its history allowed nearly any search to be upheld under its malleable balancing test by emphasizing the importance of the governmental interests at stake. With *Chandler*, the Court appeared to signal an awareness that the exception had been extended beyond circumstances envisioned at its inception and a desire to retreat from its widespread application. However, the *Chandler* Court's failure to overrule or modify any of the prior special needs cases increased the confusion surrounding the exception.

With *Ferguson v. City of Charleston*, the Court was provided an opportunity to revisit the special needs doctrine. The Court had occasion to clarify, if nothing else, the extent to which law enforcement participation in a warrantless search would bar a special needs analysis, arguably the most important question presented by *Ferguson*. However, the Court failed to squarely address this question and provide a definitive answer. Following *Ferguson*, the answer to how much law enforcement participation in a search will be tolerated under special needs seems to be at least as much as that in *Griffin*, but not as much as that undertaken by MUSC. This is hardly the degree of clarity lower courts require in order to apply the special needs doctrine. Indeed, *Ferguson* will likely prove to be of little help in providing guidance for future special needs cases. This is due both to the unique factual situation the Court was responding to and the Court's failure to address prior inconsistencies within the exception. Reading *Ferguson* in light of *Chandler*, it seems clear that the Court is attempting to restrict the

[137] The Fourth Circuit also cited *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), as supporting the proposition that law enforcement involvement in a search does not preclude a special needs analysis. *Ferguson*, 186 F.3d at 477 n.7. However, *Sitz* was never specifically identified by the Supreme Court as a special needs case. Gagan, *supra* note 135, at 507.

application of the special needs doctrine to the limits originally envisioned by Justice Blackmun. However, until early special needs cases are modified by the Court, confusion is likely to continue to surround the doctrine. Indeed "principles of law, once bent, do not snap back easily."[138]

Steven R. Probst

[138] Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 654-55 (Marshall, J., dissenting).